Filed 2/16/16 In re Jack G. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JACK G., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. B.G., Defendant and Appellant.	G052428 (Super. Ct. No. DP024211) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gary Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Aurelio Torre, Deputies County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

I. BACKGROUND

B.G. appeals from an order terminating her parental rights to her now 10 year old son Jack. We have no choice but to affirm.

Jack came into the juvenile dependency system in September 2013 when B.G. and her boyfriend Kevin were arrested in the aftermath of a police investigation precipitated by the couple's having caused roughly $30,000 in damage to their previous residence. Kevin admitted to an officer that there were heroin and syringes in the car he used to pick up Jack from school. The owner of the residence had also found heroin syringes and spoons in the wake of their residency.

There was no question at the detention hearing that Jack had to be removed from B.G.'s custody. B.G.'s prior arrests and convictions not only included a number of drug offenses, but several property-related crimes most likely stemming from what the social worker called her "unresolved substance abuse problem."[1] Fortunately for Jack, B.G.'s parents stepped forward to have Jack placed with them, and he has been living with them (and doing well) since.

As for B.G., though, the record is clear that from the detention hearing in September 2013, to the 18-month review in March 2015, she never resolved her substance abuse problem. By the 6-month review in April 2014, she had not found a substance abuse program to help her overcome her addictions, and in fact had missed two random drug tests and tested positive for methamphetamine in one test. By the 12-month review in October 2014, she still had not found a substance abuse program – though she was promising to find one – and had missed no less than 30 random drug tests. By the final, 18-month review held in March 2015, B.G. had missed two tests, tested clearly positive (again for methamphetamine) in one, and had given insufficient specimens in two other tests, which social workers marked down in the positive column. It was at the

[1] These included receiving stolen property, grand theft, forgery, theft with a prior conviction, and second degree burglary.

18-month review the trial judge terminated reunification services, finding her progress to have been "minimal" in alleviating the conditions that caused the dependency in the first place. The trial court set a hearing pursuant to Welfare and Institutions Code section 366.26[2] (sometimes called a permanency planning hearing) for July 2015.

B.G. did not petition for a writ of mandate challenging the trial judge's decision to terminate reunification services, which, under this state's writ-it-or-lose-it rule, left the trial judge's decision unassailable. (See *Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 259, quoting *In re Cathina W.* (1998) 68 Cal.App.4th 716, 719 ["An order setting a section 366.26 hearing 'is not appealable; direct appellate consideration of the propriety of the setting order may be had only by petition for extraordinary writ review of the order.'"].) Perhaps to cure that omission, B.G. entertained the idea of a modification motion under section 388[3] and was able, when the July hearing came around, to obtain a continuance to August to allow her to file such a motion.

But she never got to her lawyer's office to sign the papers prepared for her, leaving her attorney no choice at the August hearing but to ask for yet another continuance. In making that request, her attorney gave the court no hint of the basis for the inchoate motion, and the court quickly denied it. The court terminated B.G.'s parental rights and provided for Jack's eventual adoption, most likely by B.G.'s parents.

II. DISCUSSION

A. *The Continuance Motion*

B.G. has timely appealed from the trial court's order. Her first argument, that it was an abuse of discretion to deny her a continuance to file a section 388 motion,

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[2] All undesignated statutory references in this opinion are to the Welfare and Institutions Code, all undesignated references to a subdivision or any part of a subdivision are to section 366.26.

[3] In a context like this one, section 388 serves as an "'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528 (*Kimberly F.*) citing and quoting *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

must be summarily rejected, if only because there was zero showing that anything would have, even hypothetically, demonstrated good cause to change the court's previous order. (See *Kimberly F., supra*, 56 Cal.App.4th at p. 526 ["the statute requires a showing of a change of circumstances and that modification based on that change would be in the 'best interests' of the minor children"].) To put the matter in sterner, constitutional language, the lack of any showing of prejudice affirmatively precludes this court from reversing the order. (See Cal. Const., art. VI, § 13 [no judgment may be set aside or new trial granted unless there has been a miscarriage of justice].) On top of that we may note this obvious irony: If B.G. was insufficiently motivated to make it to her own lawyer's office to sign papers already prepared for her, the trial judge could easily conclude she had been insufficiently motivated in the short period since the 18-month review to make the kind of changes in her life that would show it was in the best interest of her son to undo the previous order. (See *Kimberly F., supra*, 56 Cal.App.4th at p. 526 [statute requires showing of best interests].)

B. *The Proper Reading of the Benefit Exception*

Her other argument is essentially a legal one. Because it is undisputed that B.G.'s visits with her son Jack were regular and consistent, and further that she and Jack have a positive emotional attachment to each other, B.G. argues she is *entitled* to the "benefit exception" to adoption planning set out in section 366.26, subdivision (c)(1)(B)(i). Specifically, she contends there is no additional need that there be a showing of detriment from the prospect of termination and adoption. To quote her opening brief: "[T]he requirement of proof of detriment is not statutorily required[.]"

Our own review of the statute convinces us otherwise. B.G. relies on the isolation of just the language from subdivision (c)(1)(B)(i) taken out of context. And because B.G.'s opening brief asserts some of the common law

interpretations of the statute have gone astray,[4] we examine the actual text of the statute directly to see what it says, as distinct from merely relying on the distillations of previous cases.

We set out below the relevant language. To provide the context of the benefit exception set out in subdivision (c)(1)(B)(i), we also quote some of the preceding subdivision as well. (See *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 ["'we do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." [Citation.]' [Citation.]"].)

"(b) At the hearing, which shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, 366.22, or 366.25, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and *then shall make findings and orders in the following order of preference*:

"*(1) Terminate the rights of the parent or parents and order that the child be placed for adoption* and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.

"(2) Order, without termination of parental rights, the plan of tribal customary adoption, as described in Section 366.24 . . . .

"(3) Appoint a relative or relatives with whom the child is currently residing as legal guardian or guardians for the child, and order that letters of guardianship issue.

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[4] Cf. *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 811, footnote 7 ["Judges must always be aware of the tendency of the common law to be like the child's birthday game where a few words are whispered into the ear of one person who then repeats them to the next and so on until the words have made their way round the table and it is finally discovered that they have been mangled beyond all recognition."].)

"(4) On making a finding under paragraph (3) of subdivision (c), identify adoption or tribal customary adoption as the permanent placement goal . . . .

"(5) Appoint a nonrelative legal guardian for the child and order that letters of guardianship issue.

"(6) Order that the child be permanently placed with a fit and willing relative, subject to the periodic review . . . .

"(7) Order that the child remain in foster care, subject to the conditions described in paragraph (4) of subdivision (c) . . . .

"In choosing among the above alternatives the court shall proceed pursuant to subdivision (c).

"(c)(1) If the court determines . . . *by a clear and convincing standard*, that it is likely the child will be adopted, the court *shall terminate parental rights* and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclu`de that it is not likely the child will be adopted. . . . *Under these circumstances*, the court shall terminate parental rights unless either of the following applies:

"(A) The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child. . . .

"(B) The court finds a *compelling reason* for determining *that termination would be detrimental to the child due to one or more of the following circumstances*:

"(i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Italics added.)

Several thoughts emerge from the language of the statutory text:

(1) All else being equal, there is a clear preference, initially expressed in subdivision (b)'s list of priorities, for termination of parental rights and adoption over six other possible alternatives.

(2) All else being equal, the preference for termination and adoption is given a time priority as well. Thus the court is mandated under subdivision (b) to start adoption proceedings right after the exhaustion of the appellate rights of the parents.

(3) The statutory preference for termination and adoption previously expressed in subdivision (b) is strengthened at the beginning of subdivision (c) by the introduction of a "clear and convincing" standard for any deviation *from* termination and adoption. Thus, under subdivision (c)(1), termination and adoption become the contemplated norm and more than ordinary preponderance of the evidence is required to budge a case off that norm.

(4) The preference for termination and adoption is yet further amplified in subdivision (c)(1)(B), which specifies a "compelling reason for determining that termination would be detrimental." That is, not only is termination and adoption the norm by the time a case reaches the subdivision (c)(1) stage, but evidence must show affirmative *detriment* from termination and adoption if there is going to be any different result.

It is thus clear that by the time a reader reaches the benefit exception proper, subdivision (c)(1)(B)(i), the mere existence of the two elements of "regular visitation and contact with the child" and the child's "benefit from continuing the relationship" is, *by itself*, insufficient to merit the exception, much less mandate it as B.G.'s brief argues. B.G.'s model of the statute thus fails because it only considers the two elements it relies upon – two elements that are a small part of a long statute – in a vacuum. (See *Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 162, quoting *Stafford v. L.A. etc. Retirement Board* (1954) 42 Cal.2d 795, 799 ["our cases

have long made clear that a statutory provision cannot be interpreted in a vacuum but must 'be construed with reference to the whole system of law of which it is a part'"].) Here the basic error in B.G.'s brief is confusion between the necessary and the sufficient. In order for the benefit exception to apply, there must be a "substantial, positive emotional attachment to the parent," but that does not mean such an attachment is *enough* to require the exception to apply. Here there was not enough.

DISPOSITION

Because our analysis is strictly textual, we need not address the few appellate decisions construing the benefit exception that might possibly have paraphrased the statute beyond its plain perimeters to insert additional requirements for application of the benefit exception that are not otherwise found in the text.[5] While we certainly hope that B.G. will overcome her substance abuse problem, the order terminating B.G.'s parental rights and proposing a permanent plan of adoption must be affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.

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[5] We will, however, mention *In re S.B.* (2008) 164 Cal.App.4th 289, 299, because B.G. cites it in her opening brief for the proposition: "The parent only needs to show there is a 'substantial, positive emotional attachment' to the parent." Not so. Page 299 of the official reporter's reproduction of the *S.B.* opinion does not say a parent *only* need show substantial positive attachment. It says: "[*In re*] *Autumn H.* [(1994) 27 Cal.App.4th 567] does not narrowly define or specifically identify the type of relationship necessary to establish the exception. The exception *may apply if* the child has a 'substantial, positive emotional attachment' to the parent." (*In re S.B., supra*, 164 Cal.App.4th at p. 299, italics added.) The word "only" is simply not there.